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FILED
07/05/2023
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Montana Water Court
STATE OF MONTANA
By: D'Ann CIGLER
42A-0001-I-2023
Lambert, Kathryn
8.00

IN THE WATER COURT OF THE STATE OF MONTANA
YELLOWSTONE DIVISION ROSEBUD CREEK - BASIN 42A
INTERLOCUTORY DECREE

CLAIMANTS: Alden L. Ashley; Carol L. Ashley; Lanell Ashley;
Wesley L. Ashley; Lesli Mae A. Cottom; Red
Canyon Ranch Inc.

OBJECTOR: Northern Cheyenne Tribe

CASE 42A-0001-I-2023
42A 30143623
42A 30143624
42A 30143629

NOTICE OF FILING OF MASTER'S REPORT

This Master's Report was filed with the Montana Water Court on the above stamped date. Please review this report carefully.

You may file a written objection to this Master's Report within **10 days** of the stamped date if you disagree or find errors with the Master's findings of fact, conclusions of law, or recommendations. Rule 23, W.R.Adj.R. If the Master's Report was mailed to you, the Montana Rules of Civil Procedure allow an additional 3 days to be added to the 10-day objection period. Rule 6(d), M.R.Civ.P. If you file an objection, you must mail a copy of the objection to all parties on the service list found at the end of the Master's Report. The original objection and a certificate of mailing to all parties on the service list must be filed with the Water Court.

If you do not file a timely objection, the Water Court will conclude that you agree with the content of this Master's Report.

MASTER'S REPORT

Claims 42A 30143623 and 42A 30143624 appeared in the Interlocutory Decree with issue remarks. The Northern Cheyenne Tribe objected to all three claims. On June 12,

2023 the parties filed a Stipulation To Resolve Objections And Issue Remarks [“Stipulation”]. The Stipulation is viewable in the Court’s FullCourt Enterprise case management system.

APPLICABLE LAW

“All issue remarks to claims that are not resolved through the filing of an objection as provided in 85-2-233 must be resolved as provided in this section.” Section 85-2-248(2), MCA. “‘Implied Claim’ means a claim authorized by the water court to be separated and individually identified when a statement of claim includes multiple rights.” Rule 2(a)(33), W.R.C.E.R.

From Case 41P-108 “Circle S Ranch, Inc.” Order On Motion To Modify Claims, dated 5-16-19, at 2019 Mont. Water LEXIS 8, page 5

The Water Court recognizes implied claims in certain circumstances *In re Musselshell River below Roundup*, Case 40C-47, 1994 Mont. Water LEXIS 18, *78 (July 14, 1994). However, before the Court will recognize an implied claim, the claimant must prove that several factors exist. These include: (1) proof of two or more water rights in the original claim form or the material submitted with the claim form; (2) proof of historic use corroborating the implied claim; and (3) proof that recognizing the implied claim(s) will avoid causing a change to historic water use or increase the historic burden to other water users. *In re Foss*, Case 76HF-580, 2013 Mont. Water LEXIS 17, *32 (Jan. 31, 2013); *In re Martinell*, Case 41A-148, 2018 Mont. Water LEXIS 3, *6 (June 14, 2018). These standards assure that implied claims are not used to revive a claim that was forfeited as a matter of law by missing the filing deadline. Mont. Code Ann. § 85-2-226 (establishing conclusive presumption of abandonment of for claims not timely filed); *In re Climbing Arrow Ranch*, Case 41F-A19, 2019 Mont. Water LEXIS 1 (Mar. 6, 2019). The implied claim process also cannot be used to expand the elements of a statement of claim. *In re Eliasson Ranch Company*, Order Amending and Adopting Master’s Report, Case 40A-115, 2004 Mont. Water LEXIS 2, *6 (Jun. 28, 2004) (“*Eliasson*”).

A properly filed Statement of Claim for Existing Water Right is prima facie proof of its content pursuant to section 85-2-227, MCA. This prima facie proof may be contradicted and overcome by other evidence that proves, by a preponderance of the evidence, that the elements of the claim do not accurately reflect the beneficial use of the water right as it existed prior to July 1, 1973. This is the burden of proof for every assertion that a claim is incorrect including for claimants objecting to their own claims. Rule 19, W.R.Adj.R.

FINDINGS OF FACT

1. Claims 42A 30143623, 42A 30143624, and 42A 30143629 each appeared in the Interlocutory Decree with the following remark:

THIS CLAIM NUMBER WAS NOT INCLUDED IN THE BASIN 42A DECREE ISSUED 05/23/2013.

This remark provides notice that these claims were not in the prior Decree. It should be removed as having served its notice purpose.

2. Claim 42A 30143623 appeared in the Interlocutory Decree with the following issue remarks:

THE OWNERSHIP OF THIS RIGHT MAY BE QUESTIONABLE. PART OF THE PLACE OF USE APPEARS TO BE ON STATE LAND.

THE OWNERSHIP OF THIS RIGHT MAY BE QUESTIONABLE. PART OR ALL OF THE PLACE OF USE APPEARS TO BE ON FEDERAL LAND.

A PORTION OF THE CLAIMED POINT OF DIVERSION AND PLACE OF USE # 10 AND 11 DOES NOT MEET THE DEFINITION OF AN EXEMPT RIGHT UNDER 85-2-222, MCA, AND INVOLVES DITCHES.

THIS CLAIM APPEARS TO BE CLAIMING TWO SEPARATE SOURCES OF WATER. MORE THAN ONE WATER RIGHT MAY BE INVOLVED.

Paragraph 3.d. of the Stipulation states that the parties acknowledge the March 4, 2022 Sworn Statement Of Non-Interest filed by the Montana State Board of Land Commissioners, Trust Land Management Division “explaining that the State of Montana claims no interest in the water right claim and *Pettibone* does not apply.” The ownership issue remark concerning state land should be removed as addressed and resolved.

Paragraph 3.e. of the Stipulation notes that no federal land is included in the claimed place of use. The issue remark concerning ownership because of federal land in the place of use is erroneous and should be removed.

The Interlocutory Decree point of diversion and place of use number 10 is for the SESE section 20, T5N, R42E, ROSEBUD. Paragraph 3.a. of the Stipulation states that removal of this point of diversion and place of use resolves the issue remark concerning whether a portion of this claim is not exempt.

The Interlocutory Decree point of diversion and place of use number 11 is for the SWSW section 21, T5N, R42E, ROSEBUD, and states that this is on an UNNAMED TRIBUTARY OF ROSEBUD CREEK. Paragraphs 3.b. and 3.c. state that the source is ROSEBUD CREEK and this is

livestock direct from source, so it is exempt. The parties request generation of an implied claim for this portion of the claim on ROSEBUD CREEK. Point of diversion and place of use number 11 should be removed from this claim. Implied claim 30160041 for point of diversion and place of use number 11 will be addressed in the next Finding of Fact. The issue remark concerning two sources should be removed as addressed and resolved.

3. Claim 42A 30160041 should be generated with all elements the same as 42A 30143623 except: 1) the source name is ROSEBUD CREEK, and 2) the point of diversion and place of use should be the SWSW section 21, T5N, R42E, ROSEBUD.

4. Claim 42A 30143624 appeared in the Interlocutory Decree with the following issue remark:

THE OWNERSHIP OF THIS RIGHT MAY BE QUESTIONABLE. PART OR ALL OF THE PLACE OF USE APPEARS TO BE ON FEDERAL LAND.

Paragraph 6 of the Stipulation states that the “Claimants currently hold the grazing permit covering the federal land” included on this claim, and no changes are requested. The issue remark concerning ownership should be removed as addressed and resolved.

5. For claim 42A 30143629, the Interlocutory Decree states that point of diversion and place of use each include the SW section 2, T4N, R42E, ROSEBUD. This legal description should be changed to the NWSW section 2, T4N, R42E, ROSEBUD.

In addition, the S2SW section 2, T4N, R42E, ROSEBUD should be added to the place of use and point of diversion.

CONCLUSIONS OF LAW

1. The settlement filed by the parties is sufficient to contradict and overcome the prima facie claims and to resolve the issue remarks without evidentiary hearing. Sections 85-2-248(3) and (11), MCA..

2. Statement of Claim 42A 30143623 and the settlement filed by the parties are sufficient to generate an implied claim.

RECOMMENDATIONS

Based upon the above Findings of Fact and Conclusions of Law, this Master recommends that the Court make the changes specified in the Findings of Fact and generate implied claim

42A 30160041 to correct the Interlocutory Decree for this Basin. A Post Decree Abstract of Water Right Claim for each claim is served with this Report to confirm the recommended changes have been made in the state's centralized record system.

ELECTRONICALLY SIGNED AND DATED BELOW

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POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
ROSEBUD CREEK
BASIN 42A

Water Right Number: 42A 30143623 STATEMENT OF CLAIM

Version: 2 -- POST DECREE

Status: ACTIVE

Owners:

RED CANYON RANCH INC
622 ROSEBUD CREEK RD
FORSYTH, MT 59327 9516

WESLEY L ASHLEY
622 ROSEBUD CREEK RD
FORSYTH, MT 59327 9516

ALDEN L ASHLEY
622 ROSEBUD CREEK RD
FORSYTH, MT 59327 9516

CAROL L ASHLEY
622 ROSEBUD CREEK RD
FORSYTH, MT 59327 9516

LANELL ASHLEY
622 ROSEBUD CREEK RD
FORSYTH, MT 59327 9516

LESLI MAE A COTTOM
622 ROSEBUD CREEK RD
FORSYTH, MT 59327 9516

Priority Date: FEBRUARY 16, 1892

Type of Historical Right: USE

Purpose (use): STOCK

***Flow Rate:** A SPECIFIC FLOW RATE HAS NOT BEEN DECREED BECAUSE THIS USE CONSISTS OF STOCK DRINKING DIRECTLY FROM THE SOURCE, OR FROM A DITCH SYSTEM. THE FLOW RATE IS LIMITED TO THE MINIMUM AMOUNT HISTORICALLY NECESSARY TO SUSTAIN THIS PURPOSE.

***Volume:** THIS WATER RIGHT INCLUDES THE AMOUNT OF WATER CONSUMPTIVELY USED FOR STOCK WATERING PURPOSES AT THE RATE OF 30 GALLONS PER DAY PER ANIMAL UNIT. ANIMAL UNITS SHALL BE BASED ON REASONABLE CARRYING CAPACITY AND HISTORICAL USE OF THE AREA SERVICED BY THIS WATER SOURCE.

***Source Name:** UNNAMED TRIBUTARY OF WEST ROSEBUD CREEK

Source Type: SURFACE WATER

THE SOURCE INCLUDES MULTIPLE UNNAMED TRIBUTARIES OF WEST ROSEBUD CREEK.

***Point of Diversion and Means of Diversion:**

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		SE	15	5N	41E	ROSEBUD

Period of Diversion:	JANUARY 1 TO DECEMBER 31					
Diversion Means:	LIVESTOCK DIRECT FROM SOURCE					
2		23	5N	41E	ROSEBUD	
Period of Diversion:	JANUARY 1 TO DECEMBER 31					
Diversion Means:	LIVESTOCK DIRECT FROM SOURCE					
3	S2	24	5N	41E	ROSEBUD	
Period of Diversion:	JANUARY 1 TO DECEMBER 31					
Diversion Means:	LIVESTOCK DIRECT FROM SOURCE					
4		25	5N	41E	ROSEBUD	
Period of Diversion:	JANUARY 1 TO DECEMBER 31					
Diversion Means:	LIVESTOCK DIRECT FROM SOURCE					
5		26	5N	41E	ROSEBUD	
Period of Diversion:	JANUARY 1 TO DECEMBER 31					
Diversion Means:	LIVESTOCK DIRECT FROM SOURCE					
6		27	5N	41E	ROSEBUD	
Period of Diversion:	JANUARY 1 TO DECEMBER 31					
Diversion Means:	LIVESTOCK DIRECT FROM SOURCE					
7	E2	28	5N	41E	ROSEBUD	
Period of Diversion:	JANUARY 1 TO DECEMBER 31					
Diversion Means:	LIVESTOCK DIRECT FROM SOURCE					
8		35	5N	41E	ROSEBUD	
Period of Diversion:	JANUARY 1 TO DECEMBER 31					
Diversion Means:	LIVESTOCK DIRECT FROM SOURCE					
9		36	5N	41E	ROSEBUD	
Period of Diversion:	JANUARY 1 TO DECEMBER 31					
Diversion Means:	LIVESTOCK DIRECT FROM SOURCE					
Period of Use:	JANUARY 1 TO DECEMBER 31					

***Place of Use:**

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1			SE	15	5N	41E	ROSEBUD
2				23	5N	41E	ROSEBUD
3			S2	24	5N	41E	ROSEBUD
4				25	5N	41E	ROSEBUD
5				26	5N	41E	ROSEBUD
6				27	5N	41E	ROSEBUD
7			E2	28	5N	41E	ROSEBUD
8				35	5N	41E	ROSEBUD
9				36	5N	41E	ROSEBUD

**POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
ROSEBUD CREEK
BASIN 42A**

Water Right Number: 42A 30160041 STATEMENT OF CLAIM

Version: 1 -- ORIGINAL RIGHT

Status: ACTIVE

Owners:

RED CANYON RANCH INC
622 ROSEBUD CREEK RD
FORSYTH, MT 59327 9516

WESLEY L ASHLEY
622 ROSEBUD CREEK RD
FORSYTH, MT 59327 9516

ALDEN L ASHLEY
622 ROSEBUD CREEK RD
FORSYTH, MT 59327 9516

CAROL L ASHLEY
622 ROSEBUD CREEK RD
FORSYTH, MT 59327 9516

LANELL ASHLEY
622 ROSEBUD CREEK RD
FORSYTH, MT 59327 9516

LESLI MAE A COTTOM
622 ROSEBUD CREEK RD
FORSYTH, MT 59327 9516

Priority Date: FEBRUARY 16, 1892

Type of Historical Right: USE

Purpose (use): STOCK

Flow Rate: A SPECIFIC FLOW RATE HAS NOT BEEN DECREED BECAUSE THIS USE CONSISTS OF STOCK DRINKING DIRECTLY FROM THE SOURCE, OR FROM A DITCH SYSTEM. THE FLOW RATE IS LIMITED TO THE MINIMUM AMOUNT HISTORICALLY NECESSARY TO SUSTAIN THIS PURPOSE.

Volume: THIS WATER RIGHT INCLUDES THE AMOUNT OF WATER CONSUMPTIVELY USED FOR STOCK WATERING PURPOSES AT THE RATE OF 30 GALLONS PER DAY PER ANIMAL UNIT. ANIMAL UNITS SHALL BE BASED ON REASONABLE CARRYING CAPACITY AND HISTORICAL USE OF THE AREA SERVICED BY THIS WATER SOURCE.

Source Name: ROSEBUD CREEK

Source Type: SURFACE WATER

Point of Diversion and Means of Diversion:

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		SWSW	21	5N	42E	ROSEBUD

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: LIVESTOCK DIRECT FROM SOURCE

Period of Use: JANUARY 1 TO DECEMBER 31

Place of Use:

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1			SWSW	21	5N	42E	ROSEBUD

POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
ROSEBUD CREEK
BASIN 42A

Water Right Number: 42A 30143624 STATEMENT OF CLAIM
Version: 2 -- POST DECREE
Status: ACTIVE

Owners: RED CANYON RANCH INC
622 ROSEBUD CREEK RD
FORSYTH, MT 59327 9516

WESLEY L ASHLEY
622 ROSEBUD CREEK RD
FORSYTH, MT 59327 9516

ALDEN L ASHLEY
622 ROSEBUD CREEK RD
FORSYTH, MT 59327 9516

CAROL L ASHLEY
622 ROSEBUD CREEK RD
FORSYTH, MT 59327 9516

LANELL ASHLEY
622 ROSEBUD CREEK RD
FORSYTH, MT 59327 9516

LESLI MAE A COTTOM
622 ROSEBUD CREEK RD
FORSYTH, MT 59327 9516

Priority Date: FEBRUARY 16, 1892
Type of Historical Right: USE
Purpose (use): STOCK

***Flow Rate:** A SPECIFIC FLOW RATE HAS NOT BEEN DECREED BECAUSE THIS USE CONSISTS OF STOCK DRINKING DIRECTLY FROM THE SOURCE, OR FROM A DITCH SYSTEM. THE FLOW RATE IS LIMITED TO THE MINIMUM AMOUNT HISTORICALLY NECESSARY TO SUSTAIN THIS PURPOSE.

***Volume:** THIS RIGHT INCLUDES THE AMOUNT OF WATER CONSUMPTIVELY USED FOR STOCK WATERING PURPOSES AT THE RATE OF 30 GALLONS PER DAY PER ANIMAL UNIT. ANIMAL UNITS SHALL BE BASED ON REASONABLE CARRYING CAPACITY AND HISTORICAL USE OF THE AREA SERVICED BY THIS WATER SOURCE.

Source Name: ROSEBUD CREEK
Source Type: SURFACE WATER
THE SOURCE INCLUDES MULTIPLE UNNAMED TRIBUTARIES OF ROSEBUD CREEK.

***Point of Diversion and Means of Diversion:**

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1			13	5N	41E	ROSEBUD

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means:	LIVESTOCK DIRECT FROM SOURCE				
2		14	5N	41E	ROSEBUD
Period of Diversion:	JANUARY 1 TO DECEMBER 31				
Diversion Means:	LIVESTOCK DIRECT FROM SOURCE				
3	N2NE	24	5N	41E	ROSEBUD
Period of Diversion:	JANUARY 1 TO DECEMBER 31				
Diversion Means:	LIVESTOCK DIRECT FROM SOURCE				
4	NENW	24	5N	41E	ROSEBUD
Period of Diversion:	JANUARY 1 TO DECEMBER 31				
Diversion Means:	LIVESTOCK DIRECT FROM SOURCE				
5	W2W2	16	5N	42E	ROSEBUD
Period of Diversion:	JANUARY 1 TO DECEMBER 31				
Diversion Means:	LIVESTOCK DIRECT FROM SOURCE				
6		17	5N	42E	ROSEBUD
Period of Diversion:	JANUARY 1 TO DECEMBER 31				
Diversion Means:	LIVESTOCK DIRECT FROM SOURCE				
7	NE	18	5N	42E	ROSEBUD
Period of Diversion:	JANUARY 1 TO DECEMBER 31				
Diversion Means:	LIVESTOCK DIRECT FROM SOURCE				
8	NW	18	5N	42E	ROSEBUD
Period of Diversion:	JANUARY 1 TO DECEMBER 31				
Diversion Means:	LIVESTOCK DIRECT FROM SOURCE				
9	S2	18	5N	42E	ROSEBUD
Period of Diversion:	JANUARY 1 TO DECEMBER 31				
Diversion Means:	LIVESTOCK DIRECT FROM SOURCE				
10		19	5N	42E	ROSEBUD
Period of Diversion:	JANUARY 1 TO DECEMBER 31				
Diversion Means:	LIVESTOCK DIRECT FROM SOURCE				
11		20	5N	42E	ROSEBUD
Period of Diversion:	JANUARY 1 TO DECEMBER 31				
Diversion Means:	LIVESTOCK DIRECT FROM SOURCE				
12		21	5N	42E	ROSEBUD
Period of Diversion:	JANUARY 1 TO DECEMBER 31				
Diversion Means:	LIVESTOCK DIRECT FROM SOURCE				
Period of Use:	JANUARY 1 TO DECEMBER 31				

***Place of Use:**

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1				13	5N	41E	ROSEBUD
2				14	5N	41E	ROSEBUD
3			N2NE	24	5N	41E	ROSEBUD
4			NENW	24	5N	41E	ROSEBUD
5			W2W2	16	5N	42E	ROSEBUD
6				17	5N	42E	ROSEBUD

7	NE	18	5N	42E	ROSEBUD
8	NW	18	5N	42E	ROSEBUD
9	S2	18	5N	42E	ROSEBUD
10		19	5N	42E	ROSEBUD
11		20	5N	42E	ROSEBUD
12		21	5N	42E	ROSEBUD

POST DECREE
ABSTRACT OF WATER RIGHT CLAIM
ROSEBUD CREEK
BASIN 42A

Water Right Number: 42A 30143629 STATEMENT OF CLAIM
Version: 2 -- POST DECREE
Status: ACTIVE

Owners: RED CANYON RANCH INC
622 ROSEBUD CREEK RD
FORSYTH, MT 59327 9516

WESLEY L ASHLEY
622 ROSEBUD CREEK RD
FORSYTH, MT 59327 9516

ALDEN L ASHLEY
622 ROSEBUD CREEK RD
FORSYTH, MT 59327 9516

CAROL L ASHLEY
622 ROSEBUD CREEK RD
FORSYTH, MT 59327 9516

LANELL ASHLEY
622 ROSEBUD CREEK RD
FORSYTH, MT 59327 9516

LESLI MAE A COTTOM
622 ROSEBUD CREEK RD
FORSYTH, MT 59327 9516

Priority Date: JULY 7, 1931
Type of Historical Right: USE
Purpose (use): STOCK

***Flow Rate:** A SPECIFIC FLOW RATE HAS NOT BEEN DECREED BECAUSE THIS USE CONSISTS OF STOCK DRINKING DIRECTLY FROM THE SOURCE, OR FROM A DITCH SYSTEM. THE FLOW RATE IS LIMITED TO THE MINIMUM AMOUNT HISTORICALLY NECESSARY TO SUSTAIN THIS PURPOSE.

***Volume:** THIS RIGHT INCLUDES THE AMOUNT OF WATER CONSUMPTIVELY USED FOR STOCK WATERING PURPOSES AT THE RATE OF 30 GALLONS PER DAY PER ANIMAL UNIT. ANIMAL UNITS SHALL BE BASED ON REASONABLE CARRYING CAPACITY AND HISTORICAL USE OF THE AREA SERVICED BY THIS WATER SOURCE.

Source Name: CHICKEN COOP COULEE
Source Type: SURFACE WATER
SOURCE INCLUDES AN UNNAMED TRIBUTARY OF CHICKEN COOP COULEE.

***Point of Diversion and Means of Diversion:**

<u>ID</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1		NWSW	2	4N	42E	ROSEBUD

Period of Diversion: JANUARY 1 TO DECEMBER 31

Diversion Means: LIVESTOCK DIRECT FROM SOURCE
2 S2SW 2 4N 42E ROSEBUD
Period of Diversion: JANUARY 1 TO DECEMBER 31
Diversion Means: LIVESTOCK DIRECT FROM SOURCE
3 SE 3 4N 42E ROSEBUD
Period of Diversion: JANUARY 1 TO DECEMBER 31
Diversion Means: LIVESTOCK DIRECT FROM SOURCE
Period of Use: JANUARY 1 TO DECEMBER 31

***Place of Use:**

<u>ID</u>	<u>Acres</u>	<u>Govt Lot</u>	<u>Qtr Sec</u>	<u>Sec</u>	<u>Twp</u>	<u>Rge</u>	<u>County</u>
1			NWSW	2	4N	42E	ROSEBUD
2			S2SW	2	4N	42E	ROSEBUD
3			SE	3	4N	42E	ROSEBUD